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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURDOCK HEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner submits this reply brief to correct certain misapprehensions created by the government's brief in opposition to the petition for certiorari. Petitioner notes at the outset, however, that throughout its brief the government offers as facts numerous disputed allegations concerning petitioner that the jury never necessarily accepted—allegations that serve no purpose other than to prejudice petitioner in the eyes of this Court and to demonstrate the infirmity of the government's substantive arguments. These allegations, and their prejudicial effects, would have been precluded from presentation to the jury if petitioner's double jeopardy claims had been upheld. The goal of orderly judicial testing of criminal allegations is reduced to a nullity if the government may now litter the record with such unsubstantiated assertions.

I. PETITIONER IS ENTITLED TO THE COLLATERAL ESTOPPEL BAR THAT HE ASSERTS, AND THIS COURT SHOULD REVIEW THIS CASE TO ENSURE THAT THE LOWER COURTS DO NOT EVISCERATE THE PROTECTION INTENDED BY THE DOUBLE JEOPARDY CLAUSE.

The government does not deny that the court below failed to undertake the type of review that collateral estoppel claims require under *Ashe v. Swenson*, 397 U.S. 436 (1970), which mandates that lower courts " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, [to] conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444 (citation omitted). Apparently, the government itself failed to conduct such a review before deciding to oppose the petition for certiorari in this case and has simply endorsed the speculative theories postulated by the court below for the fact finders' acquittals at the first trial.

Instead, the government urges this Court to acquiesce in the very error that the court below fell into: casting about for any conceivable theory, no matter how unreasonable, that might sustain a conviction and avoid the just application of collateral estoppel. This practice, common among the lower courts, fails to heed *Ashe's* mandate that collateral estoppel be applied with realism, rationality, and practicality.

A. Although Petitioner's Collateral Estoppel Claim Goes to Only One Object of a Multiple-Object Conspiracy, He Is Nonetheless Entitled to a Reversal of His Conspiracy Conviction.

The government states (Resp. 7)* that even if petitioner's collateral estoppel claim involving the tax object of the conspiracy is valid, it does not entitle him to reversal of his conviction, because it is "evident" that the jury found petitioner guilty of the bribery object of the conspiracy. The government cites several inapposite cases that stand for the debatable

* The term "Resp." is used in reference to the brief of the United States in opposition to the petition for certiorari.

proposition that multiple-object conspiracy convictions may be upheld, even though one or more of the alleged objects may have been improperly defined, when the jury has convicted the defendant of a substantive offense validly charged as an object of the conspiracy. *See, e.g., United States v. Dixon,* 536 F.2d 1388, 1402 (2d Cir. 1976).

This proposition is fatally undermined by the fact that "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States,* 328 U.S. 640, 643 (1946), *reh'g denied,* 328 U.S. 818 (1946). As a result, "it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged." *United States v. Dansker,* 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). The Fourth Circuit recognized this principle during petitioner's appeal after his first trial, noting that "a verdict of guilty on a substantive offense does not necessarily show that the jury found a conspiracy to commit that same offense where other offenses are also alleged as objects of the conspiracy." *United States v. Head,* 641 F.2d 174, 179 n.7 (4th Cir. 1981) (Pet. App. 6b).

The government ignores the rule established by this Court for reviewing convictions for which both a valid and an infirm basis exist. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States,* 354 U.S. 298, 312 (1957); *see also Stromberg v. California,* 283 U.S. 359 (1931); *United States v. Head,* 641 F.2d at 179 (Pet. App. 7b). Thus, the possibility that petitioner's conspiracy conviction by the jury in the second trial was based upon a collaterally estopped issue in violation of the Double Jeopardy Clause mandates reversal of that conviction.

B. The Standard Laid Down in *Ashe* for the Application of Collateral Estoppel Is Subject to Divergent Interpretations Among the Lower Courts.

The government's assertion (Resp. 8) that the varying standards that lower courts apply in practice in construing *Ashe* are of no moment only evidences the government's willing participation in the evisceration of the collateral estoppel component of the Double Jeopardy Clause. The strict interpretation of *Ashe* by the lower courts has resulted in a situation in which "[t]he defense of collateral estoppel will not often be available to a criminal defendant." Shaefer, *Unresolved Issues in the Law of Double Jeopardy, Waller and Ashe*, 58 Calif. L. Rev. 391, 394 (1970); *see also Martin v. Estelle*, 691 F.2d 202, 205, *reh'g denied*, 693 F.2d 133 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1277 (1983). *Ashe* has unquestionably caused confusion in what lower courts do, regardless of how clearly or vaguely they have articulated these differences. *See* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 Am. Crim. L. Rev. 259 (1978). The government itself cites a Second Circuit case, *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977), criticized by the Ninth Circuit on the ground that its "extremely restrictive" application of collateral estoppel "cannot be squared with the teachings of the United States Supreme Court in *Ashe v. Swenson.*" *United States v. Hernandez*, 572 F.2d 218, 222 n.5 (9th Cir. 1978).

C. The District Court's Dismissal of the False Filing Counts Collaterally Estopped Introduction of the False Filing Prong of the Tax Object of the Conspiracy at Retrial.

The government claims that the only fact necessarily determined by the district court's dismissal of the three false filing counts at the first trial was that petitioner had not personally prepared the tax returns. (Resp. 9-10.) In fact, had the government examined the record more carefully, as *Ashe* requires a reviewing court to do, it would have discovered that, prior to dismissing the false filing charges, the trial judge was presented a copy of *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976) (A.I. 321-23), which endorses the government's theory on the reach of 26 U.S.C. § 7206(2)(1976). There is no

evidence that the judge acted on the basis of any disagreement with *Crum*. Rather, prior to dismissing the false filing charges, the trial judge emphasized that there was no evidence that petitioner either "had knowledge of what was in [the returns]," (A.I. 204), or "had any direct contact of any kind . . . [with] the preparation of the tax return[s]; no evidence he saw [them]; no evidence he was asked to approve [them] or had anything to do with [them]." (A.I. 203.) Therefore, the facts reasonably determined by the judge's dismissal of the false filing charges are that petitioner did not procure, counsel, or advise the preparation of any false returns.

The only overt acts in furtherance of the false filing prong of the tax object that the government alleged were that petitioner "caused to be prepared" two of the three returns subject to the substantive acquittals. These overt acts are within the scope of what the judge determined not to have occurred when he dismissed the false filing charges, since petitioner could not have caused to be prepared any returns, the preparation of which he did not procure, counsel or advise. The government cannot be allowed "a second bite at the apple" by once again introducing the previously determined and identical "insufficient evidence" to prove causation of false filing under the guise of overt acts in furtherance of a single object of a multiple-object conspiracy.

D. The Acquittals on the Tax Evasion Counts Collaterally Estopped Introduction of the Tax Evasion Prong of the Tax Object of the Conspiracy at Retrial.

In its analysis of the acquittals of the tax evasion charges, the government once again ignores petitioner's principal argument and offers only a hypertechnical and unrealistic theory unsupported by the lower court record. In petitioner's first trial, the district court entered an acquittal on the 1973 count of tax evasion, which involved a far greater amount of taxes than the 1974 and 1975 counts. In doing so, the court rejected the prosecutor's argument that the acquittals on tax evasion charges for 1974 and 1975 could have been based on the insubstantiality of the taxes involved, reasoning instead that the jury

had found that the failure to pay taxes in 1974 and 1975 was not "willful." (A.I. 241.) This finding alone should have precluded the retrial of the entire tax object of the conspiracy, because the absence of willfulness would negate the requisite intent for all substantive tax offenses, and the requisite intent to commit a substantive offense must exist before a defendant can be convicted of a conspiracy to commit the same offense. *See Ingram v. United States*, 360 U.S. 672, 678 (1959), *reh'g denied*, 361 U.S. 856 (1959).

The court below nevertheless speculated that the acquittals of the 1974 and 1975 tax evasion counts could have been based on a jury conclusion that the amounts of tax allegedly evaded were insubstantial. The government blindly endorses this view in its brief, but the argument fails in three independent respects. First, the government notes (Resp. 11-12) without any support that petitioner could be convicted of conspiracy to evade a substantial amount of taxes, even in the absence of a substantial amount of taxes due and owing. But unless a conspiracy would, if successfully carried out, result in the violation of a legal duty, there can be no criminal liability.

> Whatever the taxpayer's criminal state of mind may have been at the time that he filed his tax return or should have filed it and whatever wrongful conduct he may have engaged in is of no import if, in fact, a tax is not shown to be due and owing.

B. Kostelanetz & L. Bender, *Criminal Aspects of Tax Fraud Cases* 7 (3d ed. 1980). Second, and in any event, the government never argued during the lower court proceedings, and no evidence was introduced tending to show, that petitioner conspired to evade a greater amount of taxes than it had charged him with evading. This type of wildly theoretical supposition, totally unsupported by the record, is exactly what *Ashe* sought to prevent. Finally, contrary to common sense, the government simply assumes that a jury would find amounts of $9,294 and $6,249 insubstantial. *But see, e.g., United States v. Marks*, 282 F. Supp. 546 (D. Or. 1966), *aff'd*, 391 F.2d 210 (9th Cir. 1968) ($375 tax deficiency viewed as substantial because tax return reflected nothing due), *cert. denied*, 393 U.S. 839 (1968).

The government lastly asserts (Resp. 12) that even if the insubstantiality of the amount of taxes involved in 1974 and 1975 does negate the requisite intent for the tax evasion charges, the jury at the retrial of the single conspiracy count was entitled to aggregate the amounts allegedly evaded each year in considering whether the amounts evaded were substantial. This argument is spurious. Aside from the fact that the jury was never instructed that it could aggregate the amounts, the government disregards the fact that the amounts alleged to have been evaded by Raven's Hollow were never established. One of petitioner's principal defenses throughout the course of the proceedings was that no taxes were due and owing during the years in question. In this context, it must be assumed that a finding of insubstantiality is equivalent to a finding that no taxes were due and owing and that, if aggregated, those taxes would still have been insubstantial. This leads to the conslusion that petitioner lacked the intent to commit substantive tax violations in each of the tax years, or in all of them combined. Once again, an *Ashe*-type review of the record, with an eye toward realism and practicality, would prevent the kind of baseless speculation that the government urges.

E. The Absence of Intent to Defraud by Means of Tax Evasion Negates the Existence of the Intent Necessary to Defraud by Means of False Filing in Regard to the Same Tax Years.

The government implicitly argues (Resp. 12-13) that even if this Court concludes that petitioner lacked the intent to commit tax evasion because of the insubstantiality of the taxes at stake, petitioner may nonetheless possess the intent to commit the crime of false filing and, consequently, the intent to conspire to defraud the United States through false filing. While the evasion of a substantial amount of tax is not an express requirement of a false filing violation, the absence of substantiality (*e.g.*, by omitting deductions that would decrease net income) would, in any event, demonstrate an absence of intent willfully to defraud by such means, for such intent must relate to a desire to save taxes. Two leading commentators on criminal tax fraud have adopted this view. *See* B. Kostelanetz & L. Bender, *Criminal Aspects of Tax Fraud Cases* 26 (3d ed. 1980).

F. The Constitution Does Not Limit the Quantum of Double Jeopardy Protection to Which Petitioner Is Entitled.

The government makes the astonishing contention (Resp. 13-14) that, because petitioner has already enjoyed some benefit from the Double Jeopardy Clause, he is entitled to no more. Petitioner is unaware of any provision of the Constitution that rations the individual rights of United States citizens. The issue is not what quantum of constitutional protection petitioner has enjoyed, but whether petitioner has been forced to relitigate facts previously determined in his favor in circumstances where the Constitution says he should not be required to do so.

II. REVERSAL IS NECESSARY TO VINDICATE THE POLICIES OF *ABNEY v. UNITED STATES.*

The government contends that even if the court of appeals' denial of a stay of trial was at odds with *Abney v. United States,* 431 U.S. 651 (1977), this Court should not afford any remedy to petitioner. The government's argument conveniently ignores the fact that, by simply failing to issue an order granting or denying petitioner's appeal, the court of appeals effectively prevented petitioner from seeking this Court's review on the issue of whether an interlocutory appeal was appropriate. In these circumstances, the only effective method of policing the lower courts' observance of *Abney* is to reverse convictions obtained while proper interlocutory appeals were pending.

Unless this approach is followed, defendants such as petitioner will be effectively deprived of their double jeopardy rights because, even if they are ultimately acquitted at their second trials, they will be forced to relitigate issues determined in their favor in previous trials. That is, they will be forced to " 'run the gantlet' a second time." *Ashe v. Swenson,* 397 U.S. at 446 (citation omitted). While this harm cannot entirely be undone once it occurs, the likelihood of its future occurrence can be minimized by means of reversals in appropriate cases such as this.

This Court's intervention is particularly necessary where, as here, the government apparently concedes that its own attorneys have acquiesced in inconsistent interpretations of *Abney* (Resp. at 16, noting that the government has not questioned the applicability of *Abney* to collateral estoppel claims that would not have completely precluded conviction at a retrial in some cases). The genuine confusion of the lower courts on the circumstances in which rights to an *Abney* appeal arise is only underscored by the government's own citation of cases within the same circuit that follow inconsistent approaches. *Compare United States v. Larkin,* 605 F.2d 1360 (5th Cir. 1979), *modified on other grounds,* 611 F.2d 585 (5th Cir.), *cert. denied,* 446 U.S. 939 (1980), with *United States v. Mock,* 604 F.2d 336 (5th Cir. 1979).

The government also argues (Resp. at 17) that the standard of "frivolousness" applied by the court below is "essentially identical" to the standard applied in cases evaluating the right to appeal *in forma pauperis.* In fact, any similarity is purely semantic. In the *in forma pauperis* cases that petitioner has adduced, the courts have examined the merits of a claim to determine whether it is unsupported by rational argument on the law or facts. While the court below held that when a defendant's claim is "manifestly 'double jeopardy' in substantive content," the test of frivolousness is whether it is "wholly lacking in merit." *United States v. Head,* 697 F.2d 1200, 1204-05 (4th Cir. 1982), *reh'g denied,* Feb. 10, 1983. (Pet. App. 6a.) It also rejected as frivolous *per se* all claims "manifestly not [double jeopardy] in substantive content." *Id.* But, egregiously, the court also held that all double jeopardy-collateral estoppel claims that would limit proof of a particular basis of conviction, but that would not necessarily bar conviction on *all* bases, are *ipso facto* "manifestly not [double jeopardy] in substantive content." *Id.* The court placed petitioner's claims in this latter category. Thus, the court below never determined that petitioner's claims were without arguable merit, but rather subjected them to a rigid system of classification based upon an error of law. Clearly, then, the court below indeed applied an erroneous test of frivolousness.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed.

Respectfully submitted,

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